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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 173.

JAMES B. MOORE,

Petitioner,

—against—

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

May it please this Honorable Court:

Petitioner in his Brief averred the pertinent facts essential to an understanding of the Points therein discussed, and of the matters discussed by the Court of Appeals in its Opinion rendered in this cause which wholly concerned the Venue Jurisdiction of the District Court. Respondent in its "Brief on the Merits" assigns and argues matters not discussed in said "Opinion" of the Court of Appeals, or in the Petitioner's Brief. It is to that new matter in Respondent's "Brief" that petitioner directs this Reply Brief.

Supplemental Statement of the Case.

At the time petitioner sustained his injury HE WAS ASSISTING HIS CREW TO SWITCH FREIGHT CARS OUT OF A "CUT" OR GROUP OF CARS coupled together, and to place them on

various classification tracks in the respondent's railroad yard at Russell, Kentucky, FOR THE DUAL PURPOSE OF ASSISTING THE RESPONDENT TO MOVE AND TRANSPORT THESE CARS TO THEIR RESPECTIVE DESTINATIONS IN BOTH INTERSTATE AND INTRA-STATE COMMERCE (R. 51, 52).

As respects the intra-state cars in the "cut" as to which a part of the petitioner's work was concerned, the evidence unquestionably established that petitioner was engaged in intra-state commerce as alleged in his second paragraph or cause of action of his complaint. Wherefore, THE GENERAL VERDICT OF THE JURY ON THE SECOND CAUSE OF ACTION IS SUPPORTED BY THE EVIDENCE WHICH ESTABLISHED THE ALLEGATIONS OF PETITIONER'S SECOND PARAGRAPH OF THE COMPLAINT (R. 7-12), TO WIT: THAT HE WAS ENGAGED IN INTRA-STATE COMMERCE AND WAS ENTITLED TO A RECOVERY BY THE PROVISIONS OF THE EMPLOYERS' LIABILITY ACT OF THE STATE OF KENTUCKY (in which State the injury to petitioner occurred), for the negligence of the respondent, arising from its violation of the Federal Safety Appliance Act as therein set forth.

As respects the interstate cars with which petitioner's work was also directed to and concerned, the evidence further established the petitioner's allegations of his first cause of action, to wit, that he was engaged in interstate commerce and was entitled to a recovery by the provisions of the Federal Employers' Liability Act, as averred in the first paragraph of the complaint. Wherefore, the general verdict of the jury on the first cause of action is likewise supported by the evidence.

THAT THE GENERAL VERDICT OF THE JURY ON BOTH CAUSES OF ACTION IS SUPPORTED BY THE EVIDENCE IN THE RECORD IS RECONCILABLE SINCE THE EVIDENCE ESTABLISHED THAT PETITIONER'S WORK AT THE TIME HE WAS INJURED HAD A DUAL FUNCTION, TO WIT: IN CONNECTION WITH CARS, SOME OF WHICH WERE THEN ENGAGING IN INTERSTATE COMMERCE, AND THE OTHERS IN INTRA-STATE COMMERCE. As the District

Court had appropriate jurisdiction over both actions averred in the complaint, as respects both jurisdiction "over their subject matter" and "venue jurisdiction", it is therefore not essential to determine upon which cause of action the jury predicated its verdict, since the jury could properly find that the evidence supported both, since petitioner, as established by the evidence, was engaged in both inter-state and intra-state commerce at the time he was injured, and all the other averments in both actions were identically the same.

The Employers' Liability Act of Kentucky and the Federal Employers' Liability Act are identical in their provisions, excepting that the Federal Act requires "an employment in interstate commerce", while the Kentucky Act requires "an employment in intra-state commerce", as respective elements of the said respective actions.

The statement of facts and arguments contained in respondent's Brief, prompts the petitioner to call this Honorable Court's attention to the outstanding facts and evidence contained in the Record upon the more important issues herein.

SINCE THE JURY'S VERDICT WAS IN FAVOR OF PETITIONER, IT NECESSARILY FOLLOWS THAT THE EVIDENCE ADDUCED ON BEHALF OF PETITIONER, AND INFERENCES TO BE DRAWN THEREFROM, ARE PROPERLY THE DOMINANT EVIDENCE AND INFERENCES to be considered in determining whether the evidence in the Record supports the issues, and the jury's verdict. PETITIONER RESPECTFULLY SUBMITS THAT THE EVIDENCE IN THE RECORD DOES SUPPORT THE CONTENTIONS OF PETITIONER AND THE GENERAL VERDICT OF THE JURY ON HIS BEHALF.

For the sake of brevity, the petitioner will not, at this point in the Reply Brief, unnecessarily repeat the evidence but will point out to this Honorable Court the pertinent facts necessary to a clear understanding of the matters discussed.

Argument.

POINT I.

The respondent's "plea in abatement", by traversing and denying the petitioner's allegation of his complaint respecting his employment in interstate commerce, did not by reason of said traverse thereby deprive the District Court of its properly acquired jurisdiction over the subject matter of petitioner's first cause of action.

Petitioner reaffirms his contentions set forth under Point I of his Brief, pages 10 to 25 inclusive, respecting both the jurisdiction of the District Court over the subject matter of the first cause of action of petitioner's complaint and venue thereof. In addition, the petitioner herewith further submits the within supplemental contentions and authorities in support of the District Court's jurisdiction aforesaid, in reply to respondent's new matter and contentions on this issue, set forth by it, under Point II, pages 21 to 26 inclusive, of its "Brief".

1.

The allegations of petitioner's first paragraph or action of the complaint determined the District Court's jurisdiction over the subject matter thereof.

> *Central of N. J. R. R.* v. *Mills*, 113 U. S. 249, 257;
> *The Fair* v. *Kohler Dye Co.*, 228 U. S. 22, 25.

In the case of *Central of N. J. R. R.* v. *Mills* (*supra*), the rule applicable hereto, and stated by this Honorable Court, is as follows, at page 257 thereof:

> "The jurisdiction of District Courts over the subject matter of a cause of action is determined by the allegations of the complaint."

Petitioner in his first paragraph alleged in substance (R. 2-6), to wit:

> That he was employed as a yard switchman by respondent, an interstate common carrier by railroad;
>
> That on November 29th, 1930, he was caused to be injured;
>
> That his injuries were proximately caused by the negligence, as averred, of the respondent;
>
> That at the time he sustained his injuries he was employed by and engaged with respondent in interstate commerce and transportation;
>
> That he was damaged in the sum of $77,600;
>
> That he brought his action within two years of the time his cause of action arose;

and, by force of said allegations, petitioner stated a cause of action in said first paragraph of his complaint, which arose under a law of the United States, to wit: The Federal Employers' Liability Act, 45 U. S. C. A. 51, *et seq.*

Wherefore, the District Court properly acquired jurisdiction over the subject matter of petitioner's first cause of action in accord with the provisions of the Judicial Code (28 U. S. C. A. 41), since the aforestated allegations in the complaint determined that the subject matter of said First action was a suit of a civil nature at common law, involving more than $3,000.00, AND THAT IT AROSE UNDER A LAW OF THE UNITED STATES.

> Sec. 24, Amended, of the Judicial Code, 28 U. S. C. A. 41.

2.

The respondent filed a pleading wherein it denied and traversed the allegations of petitioner's first cause of action.

An examination of the averments of respondent's pleading (R. 17, 18), and a comparison thereof with the allega-

tions of petitioner's first paragraph of the complaint (R. 3) ESTABLISHES, THAT RESPONDENT'S PLEA IN ABATEMENT, BY REPEATING PETITIONER'S AVERMENTS THEREIN, MERELY DENIED AND TRAVERSED THE ALLEGATIONS SET FORTH IN PETITIONER'S COMPLAINT RESPECTING HIS "EMPLOYMENT IN INTERSTATE COMMERCE", AND FURTHER ESTABLISHES THAT RESPONDENT DID NOT AVER ANY COLLATERAL OR INDEPENDENT FACTS WHICH BY ITS NATURE WOULD ABATE PETITIONER'S FIRST CAUSE OF ACTION.

3.

The respondent's traverse of the petitioner's allegation certainly did not abate the petitioner's action.

The most that can be claimed for said traverse is that it raised an issue with respect to petitioner's allegation of his "employment in interstate commerce".

3a.

Such an issue went to the merits of the action and not to jurisdiction of the subject matter thereof.

That the issue respecting petitioner's "employment in interstate commerce" does not refer to jurisdiction is apparent from Section 24, Amended, of the Judicial Code (28 U. S. C. A. 41), which is the determining source of a Federal District Court's jurisdiction over the subject matter of an action. Nowhere therein has Congress provided that a District Court shall have jurisdiction over the subject matter of an action by reason of an action arising or occurring in "interstate commerce". Said Section 24 of the Judicial Code (*supra*), did however provide that a District Court shall have jurisdiction of an action if "the action is between citizens of different states". It is by reason of that provision, and that provision only, that allegations in a complaint referring to "a diversity of

citizenship" between party litigants refers to the jurisdiction of a District Court over the subject matter of an action. IN THE ABSENCE OF ANY PROVISION IN SECTION 24 OF THE JUDICIAL CODE (*supra*) THAT "AN EMPLOYMENT IN INTERSTATE COMMERCE" SHALL LIKEWISE PROVIDE A DISTRICT COURT WITH JURISDICTION OVER AN ACTION, THE RESPONDENT'S CONTENTION THAT THE PETITIONER'S "EMPLOYMENT IN INTERSTATE COMMERCE" REFERS TO JURISDICTION, IS WITHOUT MERIT AND UNTENABLE.

Section 24 of the Judicial Code (*supra*), does provide that a District Court shall have jurisdiction of an action if the subject matter of the action is one ARISING UNDER A LAW OF THE UNITED STATES.

THE FEDERAL EMPLOYERS' LIABILITY ACT (45 U. S. C. A., Sec. 51, *et seq.*), IS A LAW OF THE UNITED STATES AND IT CREATES A NEW RIGHT OF ACTION, OF WHICH THE REQUIREMENT THAT THE PLAINTIFF EMPLOYEE BE ENGAGED "IN INTERSTATE COMMERCE AT THE TIME HE IS INJURED", IS AN ESSENTIAL INGREDIENT AND ELEMENT OF THE ACTION CREATED BY THE FEDERAL EMPLOYERS' LIABILITY ACT. THE REQUIREMENT IN THE "ACT" THAT "AN ACTION MUST BE COMMENCED WITHIN TWO YEARS FROM THE TIME IT AROSE" IS SIMILARLY AN ELEMENT OF THE ACTION.

Am. R. v. *Coronas* (Porto Rico 1916), 230 F. 545, 144 C. C. A. 599;

Kanneles v. *Great Northern R.* (1922), 186 N. W. 389, 151 Minn. 157;

Carpenter v. *Central Vt. R.*, 107 A. 569, 93 Vt. 357;

Rademaker v. *Flynn Export Co.*, 17 F. (2d) 15.

That the allegation respecting petitioner's "employment in interstate commerce" goes to the merits and not to jurisdiction, is further determined by the following test, to wit:

A. If it goes to the merits, then on a failure of proof thereof, a plaintiff cannot recover under the Federal Em-

ployers' Liability Act, AND HIS FAILURE TO PROVE THAT ALLEGATION PUTS IN MOTION "RES ADJUDICATA" WHICH THEREAFTER PREVENTS A PLAINTIFF FROM PREDICATING HIS ACTION UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT AGAIN IN ANY OTHER COURT. A failure of proof thereof results in a failure of the action under the Federal Employers' Liability Act on its merits.

B. If this allegation goes to jurisdiction, then on failure of proof thereof, all that a court could do therein would be to dismiss the action without prejudice to the plaintiff's right to bring the same action in any other court predicated on the same law, to wit, the Federal Employers' Liability Act.

That petitioner's allegation of his "employment in interstate commerce" goes to the merits and not to the jurisdiction, was confirmed in the case of *Rice* v. *Baltimore O. & R. Co.*, 42 F. (2d) 387, 393, quoted by respondent at page 24 of its Brief in support of its contention, but which to the contrary, does not support its contention but does support the petitioner's contention, wherein (as quoted in p. 24 of Respondent's Brief):

> "The Circuit Court of Appeals for the Sixth Circuit held that:
>
> > 'The judgment should recite that the plaintiff was not engaged in interstate commerce, and for that reason, the case is dismissed * * * WITHOUT PREJUDICE TO A SUIT IN THE PROPER FORUM BASED UPON ANY RIGHTS *OTHER THAN THESE GIVEN BY THE EMPLOYERS' LIABILITY ACT.*'"

Therefore, in the case of *Rice* v. *Baltimore O. & R.* (*supra*), the Circuit Court of Appeals decided that the plaintiff therein, in failing to prove that he was engaged in "interstate commerce" as alleged in his complaint, by

reason thereof cannot again bring his action in any court based upon the Federal Employers' Liability Act. The reason therefore is apparent and is as shown by petitioner to be; that, once having failed to prove the "employment in interstate commerce" allegation, the plaintiff failed to prove an essential element of the action created by the Federal Employers' Liability Act, and which went to the merits of the action and by the rule of *"res adjudicata"* he cannot again try the same action in any other court.

3b.

Respondent by merely traversing an allegation of the complaint which went to the merits of the action, did not by reason thereof either abate the action or deprive the District Court of its properly acquired jurisdiction of the subject matter of the action.

In the case of *The Chesapeake & Ohio Railway Co.* v. *Cockrell*, 232 U. S. 146, this Honorable Court sustains the contention made by petitioner, and denies the respondent's contention which the respondent urges under Point II of its Brief at page 21 thereof, and which contention the same respondent, The Chesapeake & Ohio Railway Co. similarly urged in the *Cockrell* case, *supra*, and was there similarly denied. In said *Cockrell* case, *supra*, this Honorable Court said as follows, at page 150:

> "Rightly understood—the plaintiff's petition charged that the injury and death of the intestate was caused by the negligence of the defendants."

and at pages 150-151 thereof:

> "The railway company's petition for removal (of the action from the State Court to the District Court) did allege that the charge of negligence (all being specifically repeated) were each and all false, untrue and were known by the plaintiff or could

> have been known by the exercise of ordinary diligence to be false and untrue, etc."

and at page 152 thereof:

> "So, when in such a case a resident defendant is joined with a non-resident, the joinder * * * may be shown by a petition for removal to be only a fraudulent device to prevent a removal. BUT THE SHOWING MUST CONSIST OF A STATEMENT OF FACTS RIGHTLY ENGENDERING THAT CONCLUSION. *Merely to traverse the allegations upon which the liability of the resident defendant is rested, or to apply the epithet 'fraudulent' to the joinder, will not suffice.*"

and at page 153 thereof:

> "*The showing (by the defendant's petition for removal) amounted to nothing more than a traverse of the charges of negligence, and this showing manifestly went to the merits of the action as an entirety and not to the joinder.*"

and at pages 153 and 154:

> "We conclude therefore, that the petition for removal was not such as to require the State Court to surrender its jurisdiction."

Applying the principles of law of the *Cockrell* case to this case, it is evident that respondent herein, in its plea in abatement, did not aver any facts or make any claim that petitioner's allegations respecting his "employment in interstate commerce" were fraudulent. Neither does said "plea in abatement" aver facts which petitioner could deny and make issue to respecting an abatement of the action. All that respondent's pleading did was to traverse (by verbatim repetition) the allegation of the petitioner's complaint respecting his "employment in interstate commerce". And, as similarly contended by this Honorable Court in the said *Cockrell* case, the petitioner likewise herein con-

tends that respondent's aforesaid traverse raised an issue which went to the merits of petitioner's action "as an entirety", since the elements of negligence, "an employment in interstate commerce", and "that the action be commenced within two years from the time it arose", are all similarly and equally essential elements of the action created by the Federal Employers' Liability Act, and all these elements go to the merits of the action aforesaid "as an entirety".

C. & O. Ry. Co. v. Cockrell, 232 U. S. 146;
Am. R. v. Coronas, 230 F. 545;
Kannelos v. G. N. R. Co., 186 N. W. 389, 151 Minn. 157;
Carpenter v. C. Vt. R. Co., 107 A. 569, 93 Vt. 357;
Rademaker v. Flynn Export Co., 17 F. (2d) 15.

And, as held in the Cockrell case, supra, this mere traverse did not require the District Court to surrender its jurisdiction.

4.

Respondent's pleading as a demurrer to the jurisdiction failed of its purpose.

The respondent at page 24 of its Brief, refers to the case of *Aldredge v. Baltimore & O. R. Co.*, 20 F. (2d) 655, in support of its contentions. Respondent, however, failed to set out in its Brief all of the pertinent facts in said *Aldredge* case. An examination of that case discloses the following, as stated by the Circuit Court of Appeals therein at page 658:

> "There was thus presented to the Federal Court on the motion to remand, the question WHETHER ON THE UNDISPUTED FACTS PLAINTIFF WAS ENGAGED IN INTERSTATE COMMERCE AT THE TIME OF THE ACCIDENT."

Here, in this the *Moore* case, a question is not presented on undisputed facts; on the contrary, respondent by its Traverse and Denial disputes the facts alleged by petitioner.

In the *Aldredge* case (*supra*), page 658, the Court said:

> "*Defendant did not traverse the allegations in the complaint* * * *. These allegations remained uncontroverted. The specific allegations control* * * *."

And that Court further held that the facts recited in the plaintiff's complaint failed to aver and establish sufficiently that he was engaged in "interstate commerce" at the time he was injured, and it therefore failed to aver an action under the FEDERAL EMPLOYERS' LIABILITY ACT. Applying the same test to this, the *Moore* case, the facts as to what petitioner was doing at the time he was injured are alleged in the first paragraph of his complaint (R. 3), AND THE FACTS AVERRED BY PETITIONER THEREIN UNQUESTIONABLY AND UNDISPUTABLY ESTABLISHES AND DETERMINES THAT MOORE, THE PETITIONER HEREIN, WAS ENGAGED IN "INTERSTATE COMMERCE AND TRANSPORTATION" AT THE TIME HE SUSTAINED HIS INJURY.

The pleading of the respondent, acting as a "demurrer to the District Court's jurisdiction", tested the sufficiency of the allegations of petitioner's complaint, as was done in the *Aldredge* case (*supra*). Since, by the sufficiency of the allegations his complaint established that he was employed in interstate commerce, it follows that the District Court herein properly overruled the respondent's "demurrer to its jurisdiction".

In the case of *Mahr* v. *Union Pacific Railway Co.*, 140 Fed. 921, the Court held in Syllabus 3 thereof, as follows:

> "An averment in a motion by a defendant to

> quash the service, 'THAT THE SUBJECT MATTER OF THE ACTION WAS NOT AND NEVER HAS BEEN AND IS NOT NOW WITHIN SAID STATE' * * * is equivalent to a 'demurrer' that the Court has no jurisdiction of the subject matter of the action."

To the same effect is the case of *Elliot* v. *Lawhead*, 43 Ohio State, 171, 176 (1 N. E. 577), in which case, cited in 4 Corpus Juris 1334, the Court therein held as follows:

> "This motion assigns two reasons * * *. Second: the Court had no jurisdiction over the subject matter. THIS LAST GROUND WAS IN THE NATURE OF A DEMURRER TO THE JURISDICTION OF THE COURT."

The respondent filed a pleading which it named a "plea in abatement". As stated by the Court in the case of *Massachusetts Bonding and Insurance Co.* v. *Bridge Co.*, 37 F. (2d) 695, in effect

> "the character of a pleading is determinable from its substance and not from its form or labelling."

So here, since respondent's "plea in abatement" did not set up any independent or collateral facts in abatement of petitioner's action, it was not a plea in abatement in fact, but was only such by its label. As a "demurrer to the District Court's jurisdiction", it failed. By its traverse of petitioner's allegation it partook of the function of an "Answer of Denial to the Merits", since it thereby undertook to raise an issue of fact going to the merits of the action, which is the function of an "Answer of Denial to the Merits" and not the function of a "plea in abatement". Petitioner demurred to this irregular pleading. The District Court sustained the petitioner's demurrer thereto and overruled the respondent's pleading. By its overruling of same, the District Court thereby required the respondent to file its pleading in the proper form and procedure and to label it by its correct name if respondent desired it to

function as an "Answer to the Merits". This the respondent did by re-filing it in the form of an "Answer of General Denial" to the merits of petitioner's first cause of action (R. 20). Thereafter, on the trial of the general issues raised by respondent's aforesaid "Answer of General Denial", the District Court submitted the issues of fact respecting petitioner's "employment in interstate commerce" to the jury for its determination (R. 101).

Wherefore, the action of the District Court is without error wherein it overruled respondent's so-called "plea in abatement" and refused, because of the filing of said plea, to surrender its properly acquired jurisdiction.

POINT II.

A

The District Court properly acquired venue jurisdiction over the person of the respondent as respects the petitioner's first cause of action, by force of Section 6, the applicable venue provision of the Federal Employers' Liability Act (45 U. S. C. A. 56).

Petitioner in the first cause of action of his complaint fully alleged and averred his said action under the Federal Employers' Liability Act (R. 2-6), a law of the United States.

Wherefore, by reason of the aforesaid allegations of his complaint, the District Court properly acquired jurisdiction over the subject matter of said first cause of action.

C. R. R. of N. J. v. Mills, 113 U. S. 249, 257;
The Fair v. Kohler Dye Co., 228 U. S. 22, 25.

The petitioner's first cause of action being an action arising under the Federal Employers' Liability Act, the

venue provision provided by said Act, to wit, Section 6, Amended, 45 U. S. C. A. 56, governed the petitioner's first cause of action. That venue provision of the Federal Employers' Liability Act determined that the District Court herein had jurisdiction over the person of the respondent as respects said first cause of action.

Petitioner by reference herein, re-incorporates and re-affirms the authorities and arguments appearing in his Brief, pages 3 to 4 thereof, and pages 10 to 25 inclusive thereof, in support of his contention that the venue provision of the Federal Employers' Liability Act was the determining venue provision applicable to petitioner's first cause of action.

B

Respondent entered its general appearance to petitioner's first cause of action, and by reason thereof, conferred upon the District Court venue jurisdiction with respect to said first cause of action.

As established by petitioner in his Brief and reaffirmed under Point II, "A" herein, the District Court acquired venue jurisdiction over the first cause of action by force of the applicable venue provision, to wit, Section 6 of the Federal Employers' Liability Act (45 U. S. C. A. 56). Nevertheless, and *in addition thereto, petitioner further contends that the respondent voluntarily entered its general appearance to said first cause of action*, and by reason thereof, it voluntarily conferred upon the District Court appropriate venue jurisdiction over its person as respects said first cause of action.

RESPONDENT ENTERED ITS GENERAL APPEARANCE TO THE FIRST CAUSE OF ACTION BY THE FILING OF ITS PLEADING

WHEREIN IT CHALLENGED THE JURISDICTION OF THE DISTRICT COURT OVER THE SUBJECT MATTER OF THE FIRST CAUSE OF ACTION, BY AVERRING IN SAID PLEADING, as follows, to wit:

(R. 17-18) "First: The Chesapeake and Ohio Railway Company, the defendant in the above entitled cause, appearing specially and for the purpose of this answer only, by way of amended answer in abatement to Paragraph I of plaintiff's complaint herein, says:

That on November 29, 1930, and at the time of the alleged grievances complained of in said paragraph of complaint, the plaintiff was not employed by defendant in commerce between any of the several states or territories, or between any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, NOR WAS HE IN ANY RESPECT EMPLOYED BY OR ENGAGED IN INTERSTATE COMMERCE AS THEREIN ALLEGED, nor was he assisting in switching freight cars from off the Shop Track easterly and over and onto the defendant's classifying tracks in the yards referred to in said paragraph of complaint for any of the following purposes to wit: placing cars into trains so that said cars could continue any original movements in Interstate Commerce which were temporarily interrupted at said yard for the purpose of making 'running' repairs to said cars; placing cars into trains for the purpose of moving said cars from Russell, Kentucky, to points in the State of West Virginia, Virginia and other states of the United States; placing cars in trains for the purpose of continuing the movements of said cars in Interstate Commerce from Ohio, Illinois, Indiana and other states of the United States to their destination in the State of Kentucky; clearing the Shop Track Number 2 *referred to in said paragraph of complaint* of the cars therein referred to in order that plaintiff could assist his

crew in the movement of other cars from Track Number 18 in said yard, *referred to in said paragraph of complaint,* to said Shop Track Number 2 immediately following upon the clearing of the cars off of the Shop Track as aforesaid, for the purpose of making of running repairs to said cars on said Number 18 track in order that said cars could continue any original movement in Interstate Commerce from Ohio, Indiana, Illinois, Virginia, West Virginia, Kentucky or other states of the United States to their destinations, and THAT BY REASON THEREOF THIS COURT HAS NO JURISDICTION TO HEAR AND DETERMINE THIS ACTION pursuant to the Act of Congress of the United States approved April 22, 1908, and Amendments thereto, and which Act is commonly known as the Federal Employers' Liability Act.

It further says that at all times mentioned in said paragraph of complaint it was and now is as therein alleged a corporation duly organized and acting as such under and by virtue of the laws of the State of Virginia, and it further says that during all said times it was and now is an inhabitant of the Eastern District of Virginia, and that in so far as the action declared upon in said paragraph is brought against the defendant or arises under or by virtue of the Act of the Congress of the United States known as the Safety Appliance Acts and the Rules and Orders lawfully promulgated thereunder by the United States Interstate Commerce Commission, the same cannot be brought in any district court against this defendant by any original process or proceeding in any other district that said Eastern District of Virginia whereof it is an inhabitant as aforesaid.

WHEREFORE, IT SAYS THAT THIS COURT HAS NO JURISDICTION OVER THIS ACTION or the person of this defendant and it prays that the same shall abate and be dismissed."

RESPONDENT BY AVERRING in said pleading (R. 17, 18) that

> *"Plaintiff was not employed by defendant in commerce between any of the several states,—nor was he in any respect employed or engaged in interstate commerce as therein alleged,—and that by reason thereof this Court has no jurisdiction to hear and determine this action.—Wherefore, it says that this court has no jurisdiction over this action"*,

thereby CHALLENGED THE DISTRICT COURT'S JURISDICTION over the subject matter of the first cause of action, and by force thereof, respondent entered its general appearance to said first cause of action.

> Corpus Juris, Sec. 27, Vol. 4, page 1333;
> *Fitzgerald Construction Co.* v. *Fitzgerald*, 137 U. S. 98, 34 Law Ed. 608;
> *Mahr* v. *Union Pacific Railway Co.*, 140 Fed. 921;
> *McComb et al.* v. *U. S. Housing Corp.*, 264 Fed. 589, 590.

Corpus Juris, Sec. 27 (*supra*), states the applicable rule of law as follows, to wit:

> "A party makes a general appearance by objecting to the jurisdiction of the Court over the subject matter of the action, whether the objection is made by a motion or by a formal pleading."

In *Fitzgerald Construction Co.* v. *Fitzgerald* (*supra*) the defendant filed a demurrer to the petition and asserted therein:

> (P. 103) "That the District Court of Lancaster County, Nebraska, never had or acquired any jurisdiction of the defendant, and this Court has no

jurisdiction to hear, try and determine the matters and things in controversy herein,"

and at page 105:

"The question as raised went deeper than objection to service merely, AND ATTACKED THE POWER OF THE COURT TO PROCEED AT ALL,"

and at page 106:

"By the amendment to its Answer, its plea and motions, the defendant insisted that the Court had no jurisdiction to proceed, and thereby declined to stand upon the objection to the service AND SUBMITTED ITSELF TO THE DECISION OF THE COURT IN RESPECT TO JURISDICTION OVER THE SUBJECT MATTER."

In the case of *Mahr* v. *Union Pacific Railway Co.* (*supra*), the Court held, in Syllabus 3, as follows:

"An AVERMENT in a motion by a defendant to quash the service, 'THAT THE SUBJECT MATTER OF THE ACTION "WAS NOT AND NEVER HAS BEEN AND IS NOT NOW WITHIN SAID STATE"' where the action is brought, is EQUIVALENT TO A 'DEMURRER THAT THE COURT HAS NO JURISDICTION OF THE SUBJECT MATTER OF THE ACTION' and the filing of such motion in a Federal Court in that state CONSTITUTES A GENERAL APPEARANCE."

In the case of *McComb et al.* v. *U. S. Housing Corp.* (*supra*), the Court stated, at page 591, as follows:

"The defendant entered a special appearance and moved to quash the aforesaid order for the reason, amongst others, (4) that the suit, though nominally against the defendants herein, is in law a suit against the United States and consequently that the Court is and has been without jurisdiction",

and the Court in the *McComb* case (*supra*) construed this

averment as a challenge of its jurisdiction over the subject matter of the action and held that said averment in said pleading constituted a general appearance by the defendant to the action.

IT IS THEREFORE EVIDENT THAT RESPONDENT ENTERED ITS GENERAL APPEARANCE TO PETITIONER'S FIRST CAUSE OF ACTION WHEN, BY ITS PLEADING, IT CHALLENGED THE JURISDICTION OF THE DISTRICT COURT OVER THE SUBJECT MATTER OF THE FIRST CAUSE OF ACTION, AND BY FORCE OF ITS GENERAL APPEARANCE, RESPONDENT CONFERRED UPON THE DISTRICT COURT APPROPRIATE VENUE JURISDICTION TO TRY AND DETERMINE SAID FIRST CAUSE OF ACTION.

That respondent in the same pleading objected to the District Court's jurisdiction over its person, did not by reason thereof, alter the effect of its general appearance aforesaid.

In the case of *Fitzgerald Construction Company* v. *Fitzgerald*, 137 U. S. 98, 34 Law Ed. 608, this Honorable Court held, in Syllabus 2 thereof, as follows, to wit:

> "In such case, objection to jurisdiction over the person to be availing must not be raised in connection with denial of jurisdiction over the subject matter."
>
> (P. 106) "There was no action on its part confined solely to the purpose of questioning the jurisdiction over the person. That such jurisdiction resulted under the circumstances, admits of no doubt."

In the case of *Mahr* v. *Union Pacific Railway Co.*, 140 Fed. 921, the Court held, in Syllabus 1 thereof, to wit:

> "Whenever a litigant appears to deny jurisdiction over his person, he must confine himself to that particular branch of jurisdiction, and if in his motion, he also challenges the jurisdiction of the Court over the subject matter of the action, he waives

want of service and enters a general appearance, NOTWITHSTANDING ANY WORDS OF LIMITATION IN HIS MOTION."

Syllabus 2: "The right of a defendant in a Federal Court to be sued in the District of his residence, is one which he may waive and which is waived by a general appearance."

In the case of *McComb et al.* v. *U. S. Housing Corp.*, 264 Fed. 589, the Court held, in Syllabus 2 thereof, as follows, to wit:

"APPEARANCE: Only jurisdiction over the person and not over the cause may be raised by special appearance. The object of a special appearance is to enable a defendant to raise the question of the jurisdiction of the Court over the person of the defendant, and an objection to jurisdiction of the cause may not be raised on a special appearance."

In the case of *Elliott* v. *Lawhead*, 43 Ohio St. 171, 176, 1 N. E. 577, which case is cited in 4 Corpus Juris, 1334, the Court said:

"THIS MOTION ASSIGNS two reasons why it should be granted: First—want of legal and proper service; and Second—Because THE COURT HAD NO JURISDICTION OF THE SUBJECT MATTER. THIS LAST GROUND WAS IN THE NATURE OF A DEMURRER TO THE JURISDICTION OF THE COURT AND WAS IN ITSELF AN APPEARANCE IN THE CASE."

The respondent, by incorporating in its pleading—both an objection to "jurisdiction over its person" and an "objection to jurisdiction over the subject matter of the action", thereby waived its objection to the District Court's "jurisdiction over its person", and by force of its objection to the District Court's "jurisdiction over the subject matter of said first cause of action" it entered its general appearance to said first cause of action.

THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA ACQUIRED JURISDICTION "OVER THE PERSON" OF THE DEFENDANT WITH RESPECT TO THE FIRST CAUSE OF ACTION, FIRST: BY FORCE OF THE MANDATE OF SECTION 6, THE APPLICABLE VENUE PROVISION OF THE FEDERAL EMPLOYERS' LIABILITY ACT (45 U. S. C. A. 56),

AND, OR SECOND: BY FORCE OF THE GENERAL APPEARANCE ENTERED BY RESPONDENT TO PETITIONER'S FIRST CAUSE OF ACTION, SO ENTERED BY IT WHEN IN ITS PLEADING AFORESAID IT CHALLENGED THE JURISDICTION OF THE DISTRICT COURT OVER THE SUBJECT MATTER OF THE SAID FIRST CAUSE OF ACTION.

WHEREFORE, NO ERROR WAS COMMITTED BY THE DISTRICT COURT IN ITS ASSUMPTION OF *VENUE JURISDICTION OVER SAID* FIRST CAUSE OF ACTION.

POINT III.

Respondent entered its general appearance to petitioner's second cause of action, and by reason thereof conferred upon the District Court appropriate venue jurisdiction with respect to said second cause of action.

In addition and supplementary to his Brief, pages 26 to 29, petitioner herewith further submits his contentions and authorities in support of the District Court's venue jurisdiction over the said second cause of action in reply to respondent's new matter and contentions on this issue set forth by it under Point III, pages 26 to 35 inclusive, of its "Brief".

As admitted by respondent's brief, on page 31 thereof, petitioner invoked the jurisdiction of the District Court over the second paragraph or cause of action therein averred upon the ground of a diversity of citizenship, by

alleging therein that petitioner is a citizen of Indiana and that respondent is a citizen of Virginia.

The allegation of the petitioner's complaint, by its averment of a diversity of citizenship between the parties plaintiff and defendant, conferred upon the District Court jurisdiction to hear and determine the subject matter of the second cause of action, which, as was further averred in the complaint, was a suit of a civil nature at common law and involved more than $3,000 exclusive of costs and interest.

The Judicial Code, Section 24, amended (28 U. S. C. A. 41), provides, to wit:

> "ORIGINAL JURISDICTION: District Courts shall have original jurisdiction as follows: First: Of all suits of a civil nature, at common law, between citizens of different states, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00."

In the case of *Central of New Jersey Railroad Co.* v. *Mills*, 113 U. S. 249, 257, this Honorable Court held that:

> "Jurisdiction of District Courts over the SUBJECT MATTER OF A CAUSE OF ACTION IS DETERMINED BY THE ALLEGATIONS OF THE COMPLAINT."

And, similarly, this rule of law was affirmed and followed in *Fair* v. *Kohler Dye Co.*, 228 U. S. 22, 25.

Wherefore, *the allegations* in the second paragraph of the complaint *respecting petitioner's Indiana citizenship and the existence of a diversity of citizenship* between the parties, *solely determined and concerned the District Court's jurisdiction over the subject matter of the action*, and *did not relate to or concern venue jurisdiction*, that is, jurisdiction over the person of the respondent.

Respondent filed a pleading wherein it challenged the

jurisdiction of the District Court over the subject matter of said second cause of action by averring in said pleading, as follows, to wit:

(R. 14) "Second. The Chesapeake and Ohio Railway company, the defendant in the above entitled cause, appearing specially and for the purpose of this answer only, by way of answer in abatement to Paragraph II of plaintiff's complaint herein, says:

That it admits that at all times mentioned in said paragraph of complaint it was and now is a corporation duly organized and acting as such under and by virtue of the laws of the State of Virginia, and that during such time it was and now is a citizen of the state of Virginia, BUT IT DENIES THAT AT THE TIME OF THE COMMENCEMENT OF THIS ACTION THE PLAINTIFF WAS OR NOW IS a resident of the City of Fort Wayne, in Allen County in the State of Indiana, or of the Northern District of Indiana, or the Fort Wayne Division therein, or A CITIZEN OF THE STATE OF INDIANA.

It further says that during all said times it was and now is an inhabitant of the Eastern District of Virginia, and that the action declared upon in said paragraph of complaint being brought against the defendant and arising under and by virtue of the Act of the Congress of the United States commonly known as the Safety Appliance Acts and, the Rules and Orders promulgated by the Interstate Commerce Commission of the United States, the same cannot be brought in any district court against this defendant by any original process or proceeding in any other district than said Eastern District of Virginia whereof it is an inhabitant as aforesaid.

WHEREFORE IT SAYS THAT THIS COURT HAS NO JURISDICTION OVER THIS ACTION or *the person of this defendant* and it prays that the same shall abate and be dismissed."

1.

Respondent, by averring in said pleading that it "Denies that at the time of the commencement of this action the plaintiff was or now is a citizen of the State of Indiana and it says that this Court (the District Court) has no jurisdiction over this action", thereby challenged the District Court's jurisdiction over the subject matter of the second cause of action, and by force thereof respondent entered its general appearance to said second cause of action.

Corpus Juris, Sec. 27, Vol. 4, page 1333;
Fitzgerald Construction Co. v. *Fitzgerald*, 137 U. S. 98, 34 Law Ed. 608;
Mahr v. *Union Pacific Railway Co.*, 140 Fed. 921;
McComb et al. v. *U. S. Housing Corp.*, 264 Fed. 589.

Corpus Juris, Sec. 27 (*supra*), states the applicable rule of law as follows, to wit:

> "A party makes a general appearance by objecting to the jurisdiction of the Court over the subject matter of the action, whether the objection is made by a motion or by a formal pleading."

In *Fitzgerald Construction Co.* v. *Fitzgerald* (*supra*) the defendant filed a demurrer to the petition and asserted therein:

> (P. 103) "That the District Court of Lancaster County, Nebraska, never had or acquired any jurisdiction of the defendant, and this Court has no jurisdiction to hear, try and determine the matters and things in controversy herein,"

and at page 105,

> "The question as raised went deeper than objec-

> tion to service merely, AND ATTACKED THE POWER OF THE COURT TO PROCEED AT ALL;"

and at page 106,

> "By the amendment to its Answer, its plea and motions, the defendant insisted that the Court had no jurisdiction to proceed, and thereby declined to stand upon the objection to the service AND SUBMITTED ITSELF TO THE DECISION OF THE COURT IN RESPECT TO JURISDICTION OVER THE SUBJECT MATTER."

In the case of *Mahr* v. *Union Pacific Railway Co.* (*supra*), 140 Fed. 921, the Court held, in Syllabus 3, as follows:

> "*An averment* in a motion by a defendant to quash the service, 'THAT THE SUBJECT MATTER OF THE ACTION *was not and never has been and is not now within said state*', where the action is brought, *is equivalent to a 'demurrer* that THE COURT HAS NO JURISDICTION OF THE SUBJECT MATTER OF THE ACTION' *and* the filing of such motion in a Federal Court in that state *constitutes a general appearance.*"

In the case of *McComb et al.* v. *U. S. Housing Corp.* (*supra*), 264 Fed. 589, the Court stated, at page 591, as follows:

> "The defendant entered a special appearance and moved to quash the aforesaid order for the reason, amongst others, (4) that the suit, though nominally against the defendants herein, is in law a suit against the United States and consequently that the Court is and has been without jurisdiction."

and the Court construed this averment as a challenge of its jurisdiction over the subject matter of the action and held that said averment in said pleading constituted a general appearance by the defendant to the action.

It is therefore evident that respondent entered its general appearance to petitioner's second cause of action when, by its pleading, it challenged the jurisdiction of the District Court over the subject matter of the second cause of action, and by force of its general appearance, respondent conferred upon the District Court appropriate venue jurisdiction to try and determine said second cause of action.

2.

That respondent in the same pleading objected to the District Court's jurisdiction over its person, did not, by reason thereof, alter the effect of its general appearance aforesaid.

Fitzgerald Construction Co. v. *Fitzgerald*, 137 U. S. 98, 34 Law Ed. 608;
Mahr v. *Union Pacific Railway Co.*, 140 Fed. 921;
McComb et al. v. *U. S. Housing Corp.*, 264 Fed. 589;
Elliott v. *Lawhead*, 43 Ohio State 171, 176 (1 N. E. 577).

In the case of *Fitzgerald Construction Company* v. *Fitzgerald* (*supra*), this Honorable Court held, in Syllabus 2 thereof, as follows, to wit:

> "In such case, objection to jurisdiction over the person to be availing must not be raised in connection with denial of jurisdiction over the subject matter."
>
> (P. 106) "there was no action on its part confined solely to the purpose of questioning the jurisdiction over the person. That such jurisdiction resulted under the circumstances, admits of no doubt."

In the case of *Mahr* v. *Union Pacific Railway Co.* (*supra*), the Court held, in Syllabus 1 thereof, to wit:

> "Whenever a litigant appears to deny jurisdiction over his person, he must confine himself to

that particular branch of jurisdiction, and if in his motion, he also challenges the jurisdiction of the Court over the subject matter of the action, he waives want of service and enters a general appearance, NOTWITHSTANDING ANY WORDS OF LIMITATION IN HIS MOTION."

Syllabus 2: "The right of a defendant in a Federal Court to be sued in the District of his respondents, is one which he may waive and which is waived by a general appearance."

In the case of *McComb et al.* v. *U. S. Housing Corp.* (*supra*), the Court held, in Syllabus 2 thereof, as follows, to wit:

"APPEARANCE: Only jurisdiction over the person and not over the cause may be raised by special appearance. The object of a special appearance is to enable a defendant to raise the question of the jurisdiction of the Court over the person of the defendant, and an objection to the jurisdiction of the cause may not be raised on a special appearance."

In the case of *Elliott* v. *Lawhead*, 43 Ohio State 171, 176 (1 N. E. 577) (*supra*), which case is cited in 4 Corpus Juris, 1334, the Court said:

"*This motion assigns* two reasons why it should be granted: First: want of legal and proper service; and *Second*: Because *the Court had no jurisdiction of the subject matter. This last ground was in the nature of a demurrer to the jurisdiction of the Court and was in itself an appearance in the case.*"

Wherefore, the respondent, by incorporating in its pleading both an objection to "jurisdiction over its person" and an objection to "jurisdiction over the subject matter of the action", thereby waived its objection to the District Court's jurisdiction "over its person", and by force of its objection

to the District Court's "jurisdiction over the subject matter of said second cause of action", it entered its general appearance to said second cause of action.

3.

Respondent cannot change its general appearance into a special appearance by mere words of limitation in its pleading, if by the substance of the pleading a general appearance is entered to the action.

Massachusetts Bonding and Insurance Co. v. *Concrete Steel Bridge Co.*, 37 Fed. (2d) 695; *Mahr* v. *Union Pacific Railway Co.*, 140 Fed. 921.

In the case of *Massachusetts Bonding and Insurance Co.* v. *Concrete Steel Bridge Co.* (*supra*), at page 701, the Court said, in substance:

> "Whether an appearance is general or special does not depend on the form of the pleading filed but on its substance."

And, in the case of *Mahr* v. *Union Pacific Railway Co.* (*supra*), the Court held, in Syllabus 1:

> "* * * if in his motion he also challenges the jurisdiction of the Court over the subject matter of the action, he * * * enters a general appearance notwithstanding any words of limitation in his motion."

4.

Respondent also recognized the second cause of action as in court and voluntarily submitted its person to the District Court's jurisdiction.

Respondent, as aforesaid in its pleading, specifically denied petitioner's allegation that he was a citizen of

Indiana and, by force thereof, denied his allegation respecting the diversity of citizenship of the parties. This denial by respondent raised an issue of fact, respecting the diversity of citizenship of the parties, which issue as aforesaid was directed to and challenged the jurisdiction of the District Court over the subject matter of the action. The respondent, in raising this issue by its pleading, thereby submitted itself to the District Court to render its decision respecting its jurisdiction over the subject matter of the action. This the District Court did in a preliminary trial before the trial of the general issues, as the Record, page 29, indicates, to wit:

> (R. 29) "The defendant, to maintain the issues joined under its plea in abatement, offered and introduced the testimony of the witnesses and documentary evidence hereinafter mentioned, which testimony by deposition or otherwise, and on direct, cross and re-direct examination, together with such documentary evidence in condensed and narrative form, is as follows:
>
> 'DEFENDANT'S (Respondent here) EVIDENCE':
>
> DEFENDANT'S EXHIBIT 1. The deposition of MINTA A. MOORE (R. 29-30).
>
> DEFENDANT'S EXHIBIT 2-A: The deposition of LEE MOORE (R. 30-31).
>
> DEFENDANT'S EXHIBIT 2-B: The deposition of MRS. IDA LEWIS (R. 31-32).
>
> DEFENDANT'S EXHIBIT 5 : To wit:
>
> A Certificate of the Clerk of the Corporation Commission of the State of Virginia, respecting the state in which the respondent corporation was incorporated" (R. 33).

These witnesses and their evidence the respondent voluntarily produced and submitted on its behalf at this preliminary trial. The petitioner produced the testimony of

his witnesses and documentary evidence on this issue, and respondent's counsel further participated in the preliminary trial aforesaid, by cross-examining petitioner's witnesses (R. 34, 35 and 36).

The District Court thereupon rendered its decision on said evidence adduced by both parties herein and issue as follows, to wit:

> (R. 36, 37) "The Court now finds that the plaintiff is a citizen of the State of Indiana and a resident of the City of Fort Wayne, Allen County, Indiana, and finds against the defendant on its second paragraph of its plea in abatement, which is addressed to the second paragraph of the complaint."

WHEREFORE, respondent by voluntarily adducing its evidence and participating in the preliminary trial of the aforesaid issue which it, by its pleading raised, thereby voluntarily submitted its person to the decision of the District Court respecting its jurisdiction over the subject matter of the second cause of action. By force thereof, respondent recognized the second cause of action as in court, entered its general appearance, and impliedly agreed to be bound by the decision of the District Court respecting said issue and its jurisdiction over the subject matter of the second cause of action. The District Court having decided that issue against the respondent, the respondent is bound by the District Court's decision aforesaid.

To permit the respondent to now deny the venue jurisdiction of the District Court over the second cause of action, in the face of respondent's aforesaid voluntary acts and facts, would thereby permit the respondent to repudiate the District Court's decision aforesaid, after the respondent discovered that the District Court's decision was not in its favor. Respondent by its pleading raised the aforesaid issue and took a chance that the District

Court's decision would be in its favor. Having failed therein, respondent now seeks to set the judgment aside on the ground that it never had been in court at all despite its aforesaid acts to the contrary. To permit the respondent to prevail in its aforesaid contention would thereby permit it by a repudiation of its aforesaid acts, to take an undue advantage of the District Court's Federal powers and jurisdiction, which said District Court properly exercised. THIS THE RESPONDENT SHOULD NOT BE PERMITTED TO DO.

Petitioner's contention is concisely set forth in 4 Corpus Juris, page 1333, as follows, to wit:

> "Broadly stated, any action on the part of a defendant, except to object to the jurisdiction over his person, which recognizes the case as in Court, will constitute a general appearance."

And Corpus Juris (*supra*) further cites as the reason for the rule, the case of *Swecker* v. *Reynolds*, 246 Pa. 197, 202; 92 A. 76, wherein the Court said:

> "It is obviously just and fair that if a party wishes to insist on the objection that he is not in Court, he must keep out for all purposes except to make that objection. *THE REASONABLENESS OF THE RULE IS APPARENT. WITHOUT IT IT WOULD RESULT THAT A DEFENDANT COULD TAKE A CHANCE ON THE TRIAL OF THE MERITS OF THE CASE, AND FAILING THEREIN, HE COULD SET THE JUDGMENT ASIDE ON THE GROUND THAT HE HAD NEVER BEEN IN COURT AT ALL.*"

In the case of *Fitzgerald Construction Company* v. *Fitzgerald* (*supra*), 137 U. S. 98, 34 Law Ed. 608, this Honorable Court held, in Syllabus 3:

> "The defendant having denied the power of the Court to proceed at all, and upon decision against

> it, having joined issue and gone to trial on the merits, as jurisdiction existed over the subject matter, it was properly maintained over the person, even though the service on the person might have been set aside."

In the case of *Massachusetts Bonding and Insurance Co.* v. *Concrete Steel Bridge Co.*, 37 Fed. (2d) 695 (*supra*), Circuit Court of Appeals, Fourth Circuit (1930), the Court held, in Syllabus 9:

> "APPEARANCE: Any action of defendant recognizing case as in Court, except to object to jurisdiction over his person, constitutes a general appearance."

Respondent refers to the general Federal Venue Law, to wit, Section 51 of the Judicial Code (28 U. S. C. A. 112), and argues under Point III, pages 26 to 35 inclusive in its Brief, that the applicable venue provision of said Judicial Code to petitioner's second cause of action limits the institution of the suit thereof to the district of the respondent's inhabitancy, to wit, Virginia.

To respondent's contention aforesaid PETITIONER REPLIES THAT THE DISTRICT COURT ACQUIRED VENUE JURISDICTION INDEPENDENT OF SAID SECTION 51 OF THE JUDICIAL CODE AS RESPECTS THE SECOND CAUSE OF ACTION, BY REASON OF THE GENERAL APPEARANCE AFORESAID ENTERED BY RESPONDENT TO SAID SECOND CAUSE OF ACTION.

As stated by this Honorable Court, in the case of *St. L. & S. Francisco R. R.* v. *McBride*, 141 U. S. 127:

> "the right of defendant to insist upon suit against him being brought in the district whereof he is an inhabitant is a personal privilege which he may waive, * * *",

and again as follows therein:

> "The exemption from being sued in the wrong district may be waived by appearing generally * * *."

Fitzgerald Construction Co. v. *Fitzgerald* (*supra*), 137 U. S. 98;
Mahr v. *Union Pacific Railway Co.* (*supra*), 140 Fed. 921.

In the case of *Mahr* v. *Union Pacific Railway Co.* (*supra*), the Court said at Syllabus 2 thereof:

> *"The right of a defendant in a Federal Court to be sued in the district of his residence is one which he may waive and which is waived by a general appearance."*

McComb v. *U. S. Housing Corporation* (*supra*), 264 Fed. 589, 590;
4 Corpus Juris 1333, Section 27 (*supra*).

Wherefore, for the reasons and on the authorities cited by petitioner as set forth in both his Brief and this Reply Brief, petitioner submits that NO ERROR WAS COMMITTED BY THE DISTRICT COURT IN ASSUMING VENUE JURISDICTION OVER THE SAID SECOND CAUSE OF ACTION.

POINT IV.

The evidence established the allegations of petitioner's first cause of action that "he was engaged in interstate commerce and transportation at the time he was injured", and by reason thereof the overruling by the District Court of the respondent's motion "for a directed verdict on this issue" made by respondent at the close of all the evidence, is without error.

The pertinent and outstanding evidence, establishing the petitioner's engagement in "interstate commerce and transportation", is concisely set forth in Petitioner's Brief at pages 10 to 16 inclusive thereof. For the sake of brevity and to avoid repetition petitioner refers to said evidence

and adopts it herein as though fully re-written. Petitioner re-affirms that said evidence credibly and substantially shows that he was engaged in "interstate commerce and transportation" at the time he sustained his injury.

The cars that petitioner's work was concerned with at the time he was injured and which were then being transported by respondent in "interstate commerce" were, Car C & O 61355 a loaded sand car, and, Cars H V 21342 and C & O 33555 which were empty cars.

Petitioner challenges the respondent's statement appearing in its Brief at page 36 thereof, wherein it says:

> "Plaintiff was engaged in the switching of empty coal cars in a terminal yard or distribution point where they had been gathered together. The interstate character of any movement from other states had terminated when they had arrived at their stopping point in the yards and had been placed on the storage or repair tracks"

and petitioner avers that the statement of respondent in these premises is contrary to and not supported by the credible and substantial evidence in the Record.[3]

THE EVIDENCE ESTABLISHED THAT PETITIONER WAS ENGAGED IN INTERSTATE COMMERCE AT THE TIME HE WAS INJURED BECAUSE OF THE CONNECTION OF HIS WORK WITH THE MOVEMENT OF CAR C. & O. 61355 IN INTERSTATE TRANSPORTATION. THIS CAR, WHILE AT RESPONDENT'S RAILROAD YARD AT RUSSELL, KENTUCKY, HAD NOT TERMINATED ITS INTERSTATE MOVEMENT BUT WAS STILL EN ROUTE IN INTERSTATE COMMERCE AND TRANSPORTATION FROM VAUGES, OHIO, TO SURVEYOR, WEST VIRGINIA. At Russell, Kentucky, the interstate movement of this car had been temporarily interrupted for "light running repairs". Upon the completion of that work, which took three-quarters of an hour (R. 47), the car was ready to resume its interstate trip. AT THE

TIME PETITIONER WAS INJURED THE PETITIONER WAS ASSISTING HIS CREW TO MOVE THIS CAR IN SAID YARD TO A TRACK FROM WHICH IT WAS LATER TO BE TAKEN AND PLACED IN A TRAIN EN ROUTE TO ITS DESTINATION, TO WIT, SURVEYOR, WEST VIRGINIA.

(1)

Respondent did not dispute the interstate character of this car while in the Russell, Kentucky yard, the only issue between respondent and petitioner in reference to this Car C & O 61355 was with respect to its presence amongst the cars with which petitioner's work was concerned at the time he was injured.

THE PRESENCE OF THIS CAR AMONG SAID CARS UNQUESTIONABLY ESTABLISHES THE PETITIONER'S EMPLOYMENT IN "INTERSTATE COMMERCE".

That Car C. & O. 61355 was present in the "cut" of cars with which petitioner's work was concerned at the time he was injured was established on behalf of petitioner by the following adduced evidence in the Record, to wit:

> W. F. CONLEY was the respondent's yard conductor in charge of and directing the petitioner and his switching crew on that morning, November 29th, 1930 (R. 74). It was Conley's business, as conductor, to know what cars were on Track 2 and where they were to be moved in order that he could properly supervise the switching of these cars on to the various classification tracks. THE RESPONDENT CALLED CONLEY AS ITS WITNESS. On cross examination Conley testified that when the locomotive was coupled to the cars on Track 2, the morning of November 29th, 1930, THERE WERE TWENTY-ONE CARS ON THAT TRACK. HE FURTHER TESTIFIED THAT THESE TWENTY-ONE CARS then on Track 2 WERE THE SAME TWENTY-ONE CARS ENUMERATED IN PLAINTIFF'S EXHIBIT 14 (R. 49), AND WERE POSITIONED ON TRACK 2

AS SHOWN ON EXHIBIT 14 (R. 49, 75). The testimony of Conley was positive, as shown by the Record, as follows,

> "Plaintiff's Exhibit 14 was the correct list of cars on Track 2, checking them from east to west, when I pulled them out. THERE WERE TWENTY-ONE CARS ON THE TRACK. I couldn't say whether I got the most easterly car 38740, which was a set back" (R. 75).

Admittedly the most easterly car on that track was 38740, a setback car, AND THE MOST WESTERLY CAR ON THAT TRACK WAS CAR 61355, DENOTED BY AN "X-MARK" ON SAID EXHIBIT 14 (R. 49). THERE WAS NO EVIDENCE ADDUCED BY RESPONDENT OR IN THE RECORD THAT ANY OF THESE CARS WERE MOVED OR THEIR POSITIONS CHANGED BETWEEN THE TIME RESPONDENT MADE ITS CHECK OF THESE CARS ON NOVEMBER 28, 1930, AND THE TIME THESE CARS WERE MOVED OFF TRACK 2 ON NOVEMBER 29TH, 1930.

WHEREFORE, Car 61355, the LOADED INTERSTATE CAR ON THE MORNING OF NOVEMBER 29TH, 1930, STILL MAINTAINED ITS SAME POSITION ON THAT TRACK, to wit, AT THE EXTREME WESTERLY END OF THE "CUT", and was the first and most westerly car in the "cut".

In corroboration of Conley's testimony, MOORE observed the presence of the car coupled to the engine (R. 52). Moore observed that the second car west of the engine was H. V. 21342 and the third car west of the engine was C. & O. 33555.

MOORE'S CONTENTION WAS THAT CAR 61355 WAS POSITIONED BETWEEN H. V. 21342 and THE ENGINE (R. 52). Moore's testimony was positive and based on actual observation and recollection (R. 52, 55), since Moore had positioned himself on the stirrup of the second car, H. V. 21342, while the train was moving off Track 2, en route to the "lead" track (R. 51, 52). Those were the undisputed positions of

Cars H. V. 21342 and C. & O. 33555 on the morning of November 29th, 1930 (R. 52).

WHEREFORE, NO CHANGE HAVING OCCURRED IN THE RESPECTIVE POSITIONS OF THE CARS ON TRACK 2, THE EVIDENCE STRONGLY CORROBORATES PETITIONER'S CONTENTION THAT THE CAR COUPLED BETWEEN THE ENGINE AND H. V. 21342 WAS NONE OTHER THAN THIS INTERSTATE CAR 61355, since if respondent's contention is correct that it had departed the day before, then H. V. 21342 would have become and would have been the most westerly car in the "cut" and the next car coupled to the engine. THIS WAS NOT THE SITUATION. On the contrary H. V. 21342 retained its original position in the "cut", to wit, the second car from the engine.

Moore further testified that the purpose of the movement of these cars from Track 2 to the "lead" track was "to get out from these cars whatever loads were in there" (R. 52).

As against this credible and substantial evidence adduced on behalf of petitioner that Car 61355 was present in the "cut" of cars with which his work was concerned at the time he was injured, the respondent, in support of its contention that this car had departed the day before the accident from the "Russell Yard", produced only one witness, a T. C. IRWIN, its Chief Record Clerk.

Irwin testified that he had no personal knowledge of the movement of this car and undertook to testify respecting its movement on November 28th and November 29th, 1930 from records prepared in his office, AND THIS WAS ALL THE EVIDENCE INTRODUCED BY RESPONDENT ON THIS SUBJECT RESPECTING THIS ISSUE CONCERNING THE PRESENCE OF CAR C. & O. 61355 in the RUSSELL, KENTUCKY, Yard on November 29th, 1930 aforesaid.

It is striking indeed that on such an important issue, if it were true as respondent contends that Car

C. & O. 61355 departed from Russell, Kentucky, on November 28th, 1930, that respondent failed to produce even one member of its switching crew who would testify that he, from personal knowledge, participated in the movement of this car from off Track 2 to a train in said Russell, Kentucky, Yard on November 28th, 1930.

NO SUCH WITNESS OR EVIDENCE WAS PRODUCED BY RESPONDENT RESPECTING ANY SUCH ACTUAL MOVEMENT OF THIS CAR FROM OFF TRACK 2 IN THE RUSSELL YARD ON NOVEMBER 28TH, 1930.

(2)

Cars C & O 33555 and H V 21342 had not terminated their interstate movement while in the Russell, Kentucky Yard on November 29th, 1930, or, while amongst the cars with which petitioner's work was concerned at the time he was injured.

At Columbus, Ohio, these two cars were specifically consigned by the respondent to "C. V. RATCLIFFE, Raceland Shops", for the heavy repairs to be made thereto as designated on "B F 4" form cards which were attached to these cars at Columbus, Ohio, by respondent in the regular course of its business (R. 37, 38, 39, 40, 47, 50, 51, 52, 79), and they were transported by the respondent over its railroad from Columbus, Ohio, and arrived at the respondent's Russell, Kentucky, Yard on November 27th, 1930 (R. 70). THE SPECIFIED DESTINATION OF THESE TWO CARS WAS THE HEAVY REPAIR SHOP KNOWN AS "RUSSELL CAR SHOP" AND WHICH WAS LOCATED AT RACELAND, KENTUCKY (R. 37, 39, 40, 50, 52). This shop was variously known as and referred to in the trial of the case as the "RUSSELL SHOP", "NEW SHOP", and similarly, and also as the "RACELAND SHOPS", but they all referred to the "Shop" located at Raceland, Kentucky (R. 40, 50). Raceland, Kentucky, is located three miles west of

Russell, Kentucky, and the RACELAND SHOP is located still further west from Raceland (R. 50). THE UNDISPUTED EVIDENCE IN THE RECORD IS THAT THIS SHOP, VARIOUSLY REFERRED TO AS THE RUSSELL CAR SHOP, NEW SHOP, AND RACELAND SHOP, IS LOCATED AT RACELAND, KENTUCKY, AND NOT AT RUSSELL, KENTUCKY (R. 40, 50).

En route, these cars passed Raceland, Kentucky, but had not been set off at Raceland because respondent did not maintain switching facilities at Raceland, Kentucky, for the switching out from trains of cars consigned to the Raceland Shop. Therefore, these trains, as did this train with these two cars, continued on to Russell, Kentucky (R. 50).

The practice of the respondent with respect to cars consigned to the "Shop" at Raceland, Kentucky, was to place such cars on Track 2 in the Russell, Kentucky, yard and thence move them from there onto Track 20 in the same yard, and from Track 20 these cars would be moved to the Raceland, Kentucky, Shop (R. 47, 50) regularly at about 8 o'clock in the morning (R. 51).

THE PLACING OF THESE TWO CARS C. & O. 33555 AND H. V. 21342 BY RESPONDENT ON ITS TRACK 2 IN ITS RUSSELL, KENTUCKY, YARD DID NOT CONSTITUTE A DELIVERY OF THESE TWO CARS TO THEIR DESTINATION FOR THE REASON THAT TRACK 2 IN THE RUSSELL YARD IS NOT A PART OF THE "RACELAND SHOP". THE "SHOP" IS LOCATED MORE THAN A MILE AND A HALF FROM TRACK 2. TRACK 2 WAS BUT A TEMPORARY STOPPING POINT, AS PART OF THE CUSTOMARY PLAN OF THE COMPANY FOR THE MOVEMENT OF THESE CARS TO THE "SHOP" AT RACELAND (R. 47, 50, 51).

THE DESTINATION WAS THE "SHOP" AT RACELAND, KENTUCKY, AND THESE TWO CARS, UNTIL THEY HAD ACTUALLY ARRIVED AT THE "SHOP" AT RACELAND, KENTUCKY, WOULD UNTIL SUCH TIME BE STILL EN ROUTE TO THEIR DESTINATION. THIS WAS TESTIFIED

TO BY RESPONDENT'S OWN WITNESS, C. R. CALLAHAN, WHO WAS ITS ASSISTANT TERMINAL TRAIN MASTER AT RUSSELL, KENTUCKY, AND WHO ADMITTED AND TESTIFIED AS FOLLOWS:

> "These cars would not be delivered to destination until they had arrived at that Shop at Raceland" (R. 79, 80).

The issues of fact created by the evidence concerning the interstate character of the three aforementioned cars, and petitioner's work in connection therewith at the time he was injured, were properly issues for the jury and properly required the Trial Court to overrule the respondent's motion "for a directed verdict".

POINT V.

Petitioner's testimony respecting the respondent's violation of the Safety Appliance Act is in accord with the physical facts, was corroborated by evidence in the record other than his own testimony, and properly required the District Court to overrule the respondent's motion for a "directed verdict" on that issue.

Petitioner charged the respondent with the acts of negligence averred in his first cause of action, as appears in the Record at page 5 thereof, and which similarly appears as respects the second cause of action, at pages 10 and 11 thereof. (The allegations of negligence are identical in every respect in both causes of action.)

The District Court herein submitted the evidence adduced respecting the alleged negligence to the jury.

The testimony of the petitioner with respect to the physical facts surrounding the occurrence of the incident re-

sulting in his injury is in the Record, pages 50 to 59 inclusive, and is briefly, as follows:

> At about 6 o'clock in the morning of November 29, 1930, petitioner and his crew had moved a "cut" of cars from Track 2 in the Russell, Kentucky Yard of the respondent to a "lead" track in the same yard for the purpose of switching these cars out of the "cut" and onto various classification tracks in said yard (R. 51, 52, 72, 75). Berkhardt, another member of petitioner's crew, uncoupled the first easterly car in the "cut" and it was "kicked" up the track and on to a Track 20 (R. 52, 71, 72).
>
> It was petitioner's duty, in the line of his work, to "cut", that is, "uncouple" the next car from the train of cars and likewise "kick" it up the track (R. 52, 71). Petitioner thereupon undertook in the usual and ordinary manner to make said uncoupling, to wit: by operating the uncoupling lever of the car. The uncoupling lever of this car that petitioner undertook to operate was known as the "push-down" type of uncoupling lever, which required petitioner, in the usual and ordinary operation thereof, to take hold of the handle of the uncoupling lever, push it down, and by force thereof, the inner arm of the lever is supposed to raise the lock-block in the coupler and thereby effect a release of the knuckles of the cars and a separation or uncoupling thereof (R. 52, 53, 54).
>
> In taking hold of the push-down type of uncoupling lever to operate the same to effect an uncoupling, it ordinarily, normally and usually does not require the brakeman to put any part of his body between the cars to effect the uncoupling (R. 53). In the ordinary operation of a push-down type of uncoupling lever, the handle thereof, when pushed down by the brakeman, ordinarily makes a drop of 12 or 15 inches, and ordinarily the handle does not descend closer to the top of the rail than to within

18 inches from the top thereof, when the lockblock releases the knuckle and effects an uncoupling (R. 53).

Moore thereupon took hold of the handle of the uncoupling lever with his left hand and shoved it down in the usual, normal and ordinary way (R. 53). The handle descended to within at least 12 inches from the top of the rail (R. 53). The handle of the lever dropped more than 15 inches when pushed down by Moore, and *it descended in an arc inwardly between the cars* (R. 54).

Moore observed that the lever in its descent went lower than the center of the wheel (R. 54). The center of the wheel is 16 and ½ inches above the top of the rail (R. 90). Moore's further observation was that the handle in its descent went lower than the bottom of the axle of the car (R. 53). The bottom of the axle of the car is 13 and ½ inches above the top of the rail (R. 53).

Moore observed that the handle descended below his knee (R. 57), and he did not feel the lever go solid (R. 57). He observed the lever to be bent and twisted *and in that condition it could go to within a foot of the rail* (R. 53, 54, 58, 90).

The handle of the lever descended to within 12 inches of the top of the rail but the lock-block did not release the knuckle or uncouple the car (R. 54, 72). *He saw no "stop" on the car* (R. 58).

Petitioner's hand was caught by the wheel, run over and mangled, due to the low descent of the handle when operated by him and the travel of the handle inwardly between the cars, and his body was caused to be pulled between the cars and inwardly approximately 2 feet from the inner rail (R. 53, 54).

The aforesaid testimony of the petitioner was based on his own observations of the conditions and incident recited by him, and at a time when he was in a physical position

to see and observe the matters observed and testified to by him (R. 58).

The Testimony of Petitioner Is in Accord With The Physical Facts, As Established by the Following Evidence in the Record.

When Moore shoved the lever handle down he did not feel it go solid (R. 57). This was corroborated by the fact that the "stop" was "bent up" as indicated by a photograph of the car exhibited by petitioner at the trial (R. 54). There was a bend in the lever where the bolt goes through the lever (R. 54, 58). The "stop" on this car was "bent up" so that there was three or four inches "clearance" from the top of the arm to the "stop". This was indicated in the picture. The lever could still go lower in the condition the "stop" was in (R. 54, 90).

This photograph, Petitioner's Exhibit 15 (R. 54) was a correct and true representation of the car and its uncoupling lever appurtenance when operated by petitioner. Plaintiff's Exhibit 15 was examined by the jury (R. 54) and this Photograph Exhibit shows the position of the handle of the uncoupling lever therein to be closer to the rail than the center of the wheel and the bottom of the axle of the car (R. 54, 91).

THIS PHOTOGRAPH, PETITIONER'S EXHIBIT 15, WAS A PICTURE OF THE CAR WHICH THE RESPONDENT TOOK WITHIN A FEW HOURS AFTER THE OCCURRENCE OF THE ACCIDENT (R. 78), and petitioner introduced said Photograph as his Exhibit (R. 54).

Within a half minute after Moore's hand was run over by the wheel of the car, Berkhardt, the other brakeman of the crew, came to Moore's assistance and asked Moore what happened, and Moore answered to the effect that his accident was due to a "low lever" and that when he went to make the "cut", the "low lever" unbalanced him (R. 72).

Conley, the conductor of Moore's crew, was the first person who had the opportunity to and did examine the lever of the car that Moore handled. He made an examination thereof within an hour after Moore's accident and was the first person who made an examination thereof (R. 75).

The uncoupling of this car was not effected, as the car was still coupled to the rest of the cars when Conley examined the lever (R. 75). Conley signed a "Statement" which was introduced in evidence by petitioner and which "Statement" was admitted to have been signed by Conley, and to contain the facts as recited by him therein. In that statement Conley said as follows:

> "I observed that the lever of the third car that Moore was working on was too low" (R. 76).

That the lever was bent and could descend to within a foot of the rail was admitted by its witnesses (R. 87, 90).

WHEREFORE, THE EVIDENCE AND TESTIMONY OF PETITIONER IS CREDIBLE, SUBSTANTIAL, IN ACCORD WITH THE PHYSICAL FACTS, AMPLY SUPPORTED AND SUSTAINED THE ALLEGATIONS OF HIS COMPLAINT WITH RESPECT TO THE ACTS OF NEGLIGENCE CHARGED THEREUNDER, AND THE DISTRICT COURT PROPERLY OVERRULED RESPONDENT'S MOTION TO DIRECT A VERDICT RESPECTING THIS ISSUE.

San Antonio & A. P. R. R. Co. v. *Wagner*, 241 U. S. 476, 60 L. Ed. 1110;
Minneapolis & St. Paul etc. Ry. Co. v. *Popplar*, 237 U. S. 369, 59 L. Ed. 1000;
Atlantic City Ry. Co. v. *Packard*, 242 U. S. 56, 61 L. Ed. 150;
Payne v. *Colvin*, 276 Fed. 15;
Pennsylvania R. R. Co. v. *Jones*, 308 Fed. 525.

POINT VI.

The District Court did not err in its charge to the jury.

Petitioner in his complaint charged the respondent with the following act of negligence, to wit:

> (R. 5) "2. Said defendant used and permitted to be used on its aforesaid railroad a car equipped with a 'push-down' type of uncoupling lever, a part and appurtenance of the coupler, the handle of which lever when operated in the usual, normal and ordinary way dropped more than fifteen inches over all."

With respect to this allegation of negligence, the theory and contention of petitioner is concisely set forth and supported by the evidence in the record, to wit:

> (R. 53) "It was a 'push-down' type of lever.
>
> I took hold of the handle of the lever and shoved it down in the normal, usual and ordinary way.
>
> Ordinarily the lever makes a drop of twelve or fifteen inches.
>
> ON THIS OCCASION, IT MADE A DROP OF TWO FEET AT LEAST.
>
> Ordinarily, in operating a lever of this type, the handle does not descend below 'eighteen inches from the top of the rail'."
>
> (R. 53) "The handle of this lever descended to within 'at least twelve inches of the top of the rail'."
>
> (R. 53) "*This lever descended below the bottom of the axle.*
>
> The bottom of the axle is thirteen and one-half inches above the top of the rail."
>
> (R. 54) "The 'stop' is over the inner part of the arm and controls the distance that the outside arm can go down.

It is ordinarily so maintained that it will stop the downward action of the lever so that it will not exceed fifteen inches.

THE STOP ON THIS CAR WAS BENT UP * * *.

The lever could still go lower in the condition that this stop was in."

(R. 53) "I pushed it down and it went so low it unbalanced me and throwed my hand under the wheel and my hand was mangled."

Petitioner's Exhibit 15, the photograph of the car, and its coupler appurtenances, showed the handle of the lever to be in a position therein as close to the rail as was testified to by petitioner (R. 54).

The order of the Interstate Commerce Commission of March 13, 1911, promulgated in pursuance of the Federal Safety Appliance Act provides pertinently as follows:

UNCOUPLING LEVERS:

"Minimum drop of handles shall be twelve inches; maximum, fifteen inches over all. (See Pl. B.)"

"Handles of uncoupling LEVERS of the 'ROCKING' OR 'PUSH-DOWN' TYPE shall be not less than eighteen inches from the top of rail when lock-block has released knuckle."

1.

The theory and contention of petitioner was, that the handle of the lever when pushed down by petitioner descended more than fifteen inches, which brought it to within at least twelve inches from the top of the rail, in violation of the order of the Commission which prohibits a lever of this type from going below 18 inches from the top of rail to release the knuckle.

The District Court in its "Charge" to the jury adopted the petitioner's theory, and confined the jury's consideration, as respected the respondent's liability, to a determina-

tion of the question as to whether this lever descended below eighteen inches from the top of the rail when effecting an attempted release of the knuckle.

The "Charge" of the Court in the aforesaid appears as follows:

> (R. 102) "So that if you find the defendant used, in the operation of its cars, an uncoupling lever of the push-down type, the handle of which was less than eighteen inches from the top of the rail when the lock block released the knuckle, *that would be a violation of the Interstate Commerce rule and would make the defendant liable under the Safety Appliance Act* for any injury resulting to an employee by reason of a coupler of that type."

The District Court did not charge the jury, as suggested in the respondent's exception (R. 105), "that they, the jury, are entitled to award a recovery if the lever in question dropped more than fifteen inches over all". What the District Court did say, appears in the Record, to wit:

> (R. 103) "*The serious question* in this case *for you to consider is the question of whether or not the defendant violated the Safety Appliance Act*, in that it did not have an uncoupling lever that complied with the Safety Appliance Act and the rules of the Interstate Commerce Commission *with reference to the height above the rail AND the maximum movement of the handle of the uncoupling device.*"

The Court in its charge used the word "AND" when referring to the, "height above the rail AND the maximum movement of the handle" provisions of the Order instead of the word "OR". The use of the word "AND" in said pertinent charge bears out the petitioner's contention that the Court confined the jury's consideration, as respected the respond-

ent's liability, to a determination of the question and issue to wit, whether the lever descended below the "eighteen inch above the top of the rail" limitation provided by the Commission's Order.

2.

The violation of the one Provision of the Order proved the violation of the other Provision of the Order of the Commission, since the downward movement of the handle in excess of fifteen inches, by reason thereof, brought this handle of the lever closer to the top of the rail than permitted by the Order.

The position of the handle of the lever was either 28 or 29 inches above the top of the rail when Moore took hold of it and pushed it down, as was indicated by the evidence in the record, to wit:

> (R. 93) "The bottom of the end sill of the car was 36 inches above the top of the rail."
>
> (R. 86) "The position of the handle of the lever was 7 or 8 inches below the bottom of the end sill."

The descent of the handle when pushed down by Moore "in excess of fifteen inches" thereby brought it to within at least fourteen inches "from the top of the rail", as indicated from the fact that 15 inches subtracted from 29 inches (the position of the handle above the rail when Moore took hold of it) equals fourteen inches "above the top of the rail" aforesaid, to which point the handle descended to. Since the order of the Commission prohibits a lever of the "push-down" type from descending lower than "to within eighteen inches from the top of the rail", it follows that the descent of this lever to within fourteen inches of the top of the rail thereby constituted a violation of both provisions of the Order, and the violation of the one "Provision" proved the violation of the other "Provision".

3.

If, as contended by respondent in its brief and denied by petitioner, the Court erred in its charge with respect to the provision of the Commission's Order relating to the maximum fifteen inch drop of the handle, such error, if any, harmed the petitioner and not the respondent, since it imposed thereby an additional burden upon him, in order to establish his right to a recovery, of proving the violation by respondent of that provision of the Order respecting the maximum movement of the handle of the uncoupling device, as charged by the Court,

> (R. 103) "The serious question in this case for you to consider is the question of whether or not the defendant violated the Safety Appliance Act, in that it did not have an uncoupling lever that complied with the Safety Appliance Act and the rules of the Interstate Commerce Commission with reference to the height above the rail *AND* the maximum movement of the handle of the uncoupling device."

whereas petitioner could have established his right to a recovery by proving ***alone*** the violation by respondent of that Provision of the Order of the Commission respecting the "height above the rail", to wit, that "eighteen inches from the top of the rail shall be the closest point to the rail that a lever handle of the push-down type shall descend to when effecting a release of the knuckle".

This assumption on the part of the petitioner of the aforesaid additional burden of proof in no wise having harmed the respondent, the respondent's alleged error of the Court in its charge, if any, which in consequence thereof required the petitioner to assume said additional burden of proof, was not prejudicial error affecting the substantial rights of the respondent, since by reason of the charge of the Court the charge was more favorable to respondent than it was entitled to under the law.

28 U. S. C. A. 391;

St. Joseph & G. I. R. R. Co. v. *Moore*, 243 U. S. 311, 61 L. Ed. 741;

C. R. I. & P. R. R. Co. v. *Ward*, 252 U. S. 18, 64 L. Ed. 431;

Clarke v. *Erie R. R. Co.*, 230 Fed. 478.

"On the hearing of any appeal, certiorari, writ of error or motion for a new trial, in any case, civil, or criminal, the Court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects or exceptions, which do not affect *the substantial rights of the parties* (28 U. S. C. A. 391)."

CONCLUSION.

We respectfully submit that the Circuit Court of Appeals for the Seventh Circuit in this cause is in error, that its decision should be reversed and the original judgment of the District Court of the United States for the Northern District of Indiana should be restored.

Respectfully submitted,

EDWARD DAVIDSON,
CHESTER L. TEETER,
LLOYD HARTZLER,
JOHN P. BRAMHALL,
Counsel for Petitioner.